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Alimony--Right to Payment After Death of Husband (Babcock v. Babcock, 147 Misc. 900 (4th Dept. 1933))

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RECENT DECISIONS

Editor—SYLVESTER B. SINACORE

ALIMONY—RIGHT TO PAYMENT AFTER DEATH OF HUSBAND.—

The plaintiff and her husband agreed that if a divorce were obtained by personal service in any state, a specific sum as alimony shall be included in the decree, payable monthly. The husband brought action in a foreign state, during which stipulations were made by attorneys for their clients that, if decree be granted, the court shall include therein the sum agreed upon by the parties. Plaintiff sues for installments due under said decree, and to sequester the property of her deceased former husband to provide sufficient money to pay amounts to become due in the future, *held*, wife may recover alimony from deceased husband's estate under foreign state divorce decree. *Babcock v. Babcock*, 147 Misc. 900, 265 N. Y. Supp. 470 (1933), *aff'd*, — App. Div. —, 265 N. Y. Supp. 474 (4th Dept. 1933).

As regards alimony, divorce decrees of another state must be given the same effect in New York.¹ In an action for divorce where the defendant is served in the state of the forum, a judgment, irrespective of the ground upon which it is granted, is within the "full faith and credit" clause² of the Federal Constitution.³ But a decree so granted will not be recognized in this state if service is made by publication merely, in view of the statute that adultery shall be the only grounds for absolute divorce.⁴ This is not in contravention of the "full faith and credit" clause of the Constitution.⁵ It is an established policy of the courts of this state to disregard foreign decrees of absolute divorce granted for causes other than adultery when possible to do without disregarding the Federal Constitution.⁶

The rule which prevailed at common law, that the death of the husband necessarily and of itself put an end to the payment of alimony, was applicable only in divorces which did not have the effect of finally and forever terminating the marriage relations, but operated merely as temporary separations, leaving all other marital rights and obligations in full force.⁷ But where, as in this state now, alimony is awarded upon a decree of absolute divorce which at once

¹ *Stewart v. Stewart*, 198 App. Div. 337, 190 N. Y. Supp. 369 (1st Dept. 1921).

² U. S. CONST., Art. IV, §2.

³ *In re Caltabellota's Will*, 183 App. Div. 753, 171 N. Y. Supp. 82 (4th Dept. 1928).

⁴ N. Y. CIVIL PRACTICE ACT (1921) §§1171, 1172.

⁵ *Ball v. Crass*, 190 App. Div. 711, 180 N. Y. Supp. 434 (1st Dept. 1920).

⁶ *Beeck v. Beeck*, 211 App. Div. 720, 208 N. Y. Supp. 98 (1st Dept. 1925).

⁷ *Knapp v. Knapp*, 134 Mass. 353 (1883); *Smith v. Smith*, 1 (Root) Conn. 349 (1790); *Miller v. Clark*, 23 Ind. 371 (1864).

puts an end to the marriage relation for all time, the right of the divorced wife to have the payment of alimony continued to her, will depend upon the nature and terms of the decree allowing alimony.⁸ It is well settled that the amount of alimony which the husband is to pay and the length of time during which payment is to continue may be arranged between them by consent.⁹ Where husband and wife agree upon alimony, the courts will embody their agreement upon that subject in the decree.¹⁰ After the death of the husband the recovery of alimony is allowed by force of the decree alone and not because of any previous agreement between them.¹¹ It not appearing by statute or judicial decision of the state of Pennsylvania whether the provision for alimony abated upon the husband's death, the decree will be construed according to the law prevailing in this state.¹²

The liability of the estate having been determined, the Surrogate's Court will then have the power to enforce payment of such claim.¹³ Although the court is without power to establish a debt against the estate,¹⁴ it has the power to direct that funds be set aside to pay contingent and unliquidated claims.¹⁵

I. L. K.

BASTARDY PROCEEDINGS—TESTIMONY MUST BE "ENTIRELY SATISFACTORY"—DOES NOT HAVE TO BE BEYOND A REASONABLE DOUBT.—The interpretation of the rule in New York in bastardy proceedings which requires proof to be "entirely satisfactory"¹ was recently under discussion in the Appellate Division. *Held*, that the evidence should be sufficient to create a genuine belief that the defendant is the father of the child. *Commissioner of Public Welfare v. Ryan*, 238 App. Div. 607, 265 N. Y. Supp. 286 (1st Dept. 1933).

⁸ *Story v. Story*, 125 Ill. 608, 18 N. E. 329 (1899); *Pryor v. Pryor*, 18 Ark. 302, 114 S. W. 700 (1927); *Stratton v. Stratton*, 77 Me. 373, 52 Am. St. Rep. 779 (1885).

⁹ *Carpenter v. Carpenter*, 130 Misc. 698, 225 N. Y. Supp. 431 (1927).

¹⁰ *Wilson v. Hinman*, 182 N. Y. 408, 75 N. E. 236 (1905).

¹¹ *Sleicher v. Sleicher*, 251 N. Y. 370, 167 N. E. 501 (1929).

¹² *Murrin v. Archibald Consolidated Coal Co.*, 232 N. Y. 541, 134 N. E. 563 (1922).

¹³ *SURROGATE'S COURT ACT* (1922) §§207, 244.

¹⁴ *In re Thomas's Estate*, 235 App. Div. 450, 257 N. Y. Supp. 330 (1st Dept. 1932); *McLean v. Hart*, 228 App. Div. 379, 239 N. Y. Supp. 1 (1st Dept. 1930).

¹⁵ *Supra* note 13.

¹ *People v. McKay*, 72 App. Div. 527, 76 N. Y. Supp. 600 (2d Dept. 1902); *Drummond v. Dolan*, 155 App. Div. 449, 140 N. Y. Supp. 307 (2d Dept. 1913); *Webb v. Hill*, 115 N. Y. Supp. 267 (1909).